No. 80-1401

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In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT MALANCHE,

Petitioner,

v.

AMERICAN MOTORS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

Robert Malanche, Petitioner herein, worked for American Motors Corporation ("AMC"), Respondent herein, for a month in 1958 and then was discharged on account of absenteeism. In August of 1972, he applied for reemployment as a journeyman maintenance welder, but AMC was not hiring in that classification at that time. It next began such hiring in February of 1973.

The collective bargaining agreement specified that an applicant for the position of journeyman maintenance welder

must provide proof of journeyman status before hiring. With a routine application, it was the practice to interview the applicant first and then to require the documentation. But Malanche did not proceed routinely. In February of 1973, before any interview, he obtained an attorney to represent him and that attorney communicated with AMC representatives on Malanche's behalf. In the course of the communications, still in February of 1973, the attorney stated that he would "try and get some documentation" and would be in touch with AMC "as soon as possible." No documentation was forthcoming, however, and sometime later in 1973 Malanche and the president of the AMC union met with an AMC representative, at which time Malanche again was informed that he needed to document his journeyman status.

In August of 1973, Malanche, a naturalized citizen born in Mexico, filed a charge of employment discrimination based on national origin. After investigation, an employee of the state agency with which that charge was lodged wrote to Malanche advising him to document his journeyman status. Malanche furnished that documentation in February of 1974, AMC then began processing his application and he was thereafter hired in due course.

Malanche filed the complaint in the instant case on April 14, 1976. The assertion in the district court was that AMC was guilty of unlawful discrimination by reason of its delay in hiring him between February of 1973 and February of 1974. The allegation was that AMC had wrongfully deviated from its normal hiring practice by requiring him to prove journeyman welder status prior to any other processing of his application.

AMC asserted two non-discriminatory bases for its deviation: Malanche's previous discharge for absenteeism

and the communications with Malanche's attorney and the union which led AMC to believe the documentation would be furnished by Malanche within a short time.

The district court, citing *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), granted summary judgment for AMC based on its conclusion that the pleadings and affidavits which had been filed established that Malanche did not meet the burden of proof that he was qualified for the job in question prior to February of 1974. This district court decision is reproduced in Respondent's appendix, beginning on page App. 5.

The court of appeals, by unpublished order, vacated and remanded, not because of any disagreement with the district court's application of *McDonnell Douglas* standards, but because it concluded there were disputed factual issues with respect to whether the failure to process Malanche's application before he submitted proof of journeyman status was discriminatory. This decision of the court of appeals is reproduced in the Respondent's appendix, beginning on page App. 1.

Upon remand, the district court found, on the basis of the evidence submitted at a full trial, that Malanche's application was not routine and that, under the circumstances, he did not establish that he was qualified, within the meaning of *McDonnell Douglas,* until proof of his journeyman status ultimately was forthcoming. This decision of the district court is reproduced in Petitioner's appendix, beginning on page 7a.

The court of appeals, in a second unpublished order, which is the order that is the subject of the petition for certiorari herein, affirmed the decision of the district court as having ample support in the record. This decision of the court of appeals is reproduced in Petitioner's appendix, beginning on page 1a.

REASONS WHY THE WRIT SHOULD BE DENIED

In the petition for certiorari, Malanche has presented his reasons why it should be granted under three headings, labeled, respectively, A, B and C. With respect to headings A and B, while the argument is laced with some references to the trial, its thrust is to take issue with the granting of the motion for summary judgment filed by AMC and the denial of the cross motion for summary judgment filed by Malanche. Those motions were filed before trial, and Malanche appealed. He was successful to the extent that the court of appeals, in its first unpublished order, vacated the summary judgment granted to AMC, but he was unsuccessful in his attempt to obtain summary judgment in his favor. The case then proceeded to trial. AMC prevailed and Malanche appealed again, this time challenging not the disposition of the pre-trial motions but rather challenging the district court's subsequent decision based on the trial evidence. The result of this appeal was the second unpublished order of the court of appeals, affirming the district court's post-trial decision. Malanche concedes in the petition for certiorari, at pages 2-3, that it is the second order of the court of appeals, not the first, which is before this Court. In short, the disposition of the pre-trial motions for summary judgment is not now subject to review.

With respect to heading C, Malanche's argument is that the burden of proof imposed upon him was not made clear either by the court of appeals or by any other court. While the thrust of this argument is not entirely clear, it also seems to be addressed to the first order of the court of appeals, rather than to the second, because whatever the court of appeals said in its second decision, issued after the trial, could not have prejudiced Malanche's ability to proceed with the trial. Again, the first order is not now subject to review. And even assuming that the second

order is somehow being questioned, it is in no way inconsistent with *McDonnell Douglas,* as evidenced by the recent opinion of this Court in *Texas Department of Community Affairs* v. *Burdine,* ..... U.S. ....., 49 U.S.L.W. 4214 (U.S. March 4, 1981) (No. 79-1764).

In its present posture, the instant case actually is a mine run example of an oft repeated situation where, in a Title VII[1] proceeding, a trial court applies the principles enunciated in *McDonnell Douglas* to the presentation of evidence and then, guided by those principles, makes a decision based on the evidence presented; the losing party then appeals and the appellate court reviews the trial court's application of the law to the evidence. There is nothing involved which will serve as a basis for invoking the discretionary jurisdiction of this Court.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Dated this 16th day of March, 1981, at Milwaukee, Wisconsin.

Respectfully submitted,

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[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

Argued October 27, 1978

December 20, 1978.

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Philip W. Tone, Circuit Judge

ROBERT MALANCHE,

Plaintiff-Appellant,

No. 78-1211 vs.

AMERICAN MOTORS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 76 C 258

Myron L. Gordon, *Judge*.

ORDER

In this Title VII case, the district court entered summary judgment for the defendant, American Motors Corporation (AMC), and ordered the plaintiff's action dis-

missed. Malanche, the plaintiff, appeals and requests this court to reverse the judgment of the district court and either remand for a trial on the merits or enter summary judgment for the plaintiff.

Malanche applied for employment as a journeyman welder with AMC on August 7, 1972. AMC offered him employment on June 4, 1974 and he began work the next day. He alleges that AMC's delay in offering him employment was a result of national origin discrimination in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* The district court found that AMC applied nondiscriminatory standards to Malanche and that it hired him as soon as he proved his journeyman status as required by the collective bargaining agreement.

Malanche argues in this appeal that he established a prima facie case of discrimination under the standards set forth in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973), and that AMC did not meet its burden of establishing a legitimate, non-discriminatory reason for its action. A prima facie case may be established by showing:

> (i) that he [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. *Green, id.* The court in *McDonnell* recognized that the necessary proof would vary depending on the facts of the case. *Id.* at n.13. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to prove a legitimate non-discriminatory reason for its action. *Id.* at 802.

In the present case, we are of the opinion that at least one genuine issue of material fact exists which must be resolved before the *McDonnell* analysis may properly be utilized, and therefore, that summary judgment was inappropriate. AMC, in its response to Malanche's allegations, relied heavily on the fact that it hired him as soon as he documented his journeyman status and that the delay was thus attributable to his failure to submit the documentation properly notarized until February 25, 1974. Although the collective bargaining agreement clearly required that the prospective employee provide such documentation, Malanche alleges that AMC did not follow its typical procedures in processing his application for employment. He contends that AMC typically would not require the documentation until after the applicant had been through a preliminary interview with Merrill Schroeder, the Hourly Placement Coordinator and Interviewer, and a full interview with a skilled trades superintendent, and been found to be qualified by the latter. Malanche, however, was not allowed to proceed beyond the preliminary interview until he submitted the notarized documentation. Malanche supported this allegation with deposition testimony of Larry Sladek, AMC's Hourly Employment Supervisor.

AMC, in response, contends that "in practice [it] observed some flexibility as to when documentation might be required. . . ." Whether or not this flexibility existed, and whether or not AMC exercised this flexibility in a discriminatory fashion, are disputed issues of material fact which can only be resolved by a trial. These are important issues for determining whether Malanche was a qualified appli-

cant[1] for purposes of establishing a prima facie case, and for determining whether AMC could meet its burden of rebutting a prima facie case.

AMC also argues that its delay in hiring Malanche was due to its policy of not hiring persons who have been previously discharged by AMC. AMC asserts that when it was informed of Malanche's good work history subsequent to his initial discharge, which apparently was sufficient to overcome this policy, it would have then considered his application but for his failure at that time properly to document his journeyman status. Again, the factual question of whether AMC discriminated against Malanche by requiring him to provide documentation before it interviewed him becomes critical.

These disputed factual issues, for the same reasons hereinbefore stated, preclude our entering summary judgment for Malanche. We, therefore, vacate the judgment of the district court and remand the case for proceedings consistent with this order.

---

[1] Malanche claims discrimination manifested by AMC's delay in hiring him. Therefore, he must prove that he was a qualified applicant at the time he claims that AMC first discriminated against him. If AMC could nondiscriminatorily require documentation *before* granting an applicant a full interview, then submission of such documentation would be an element of being a qualified applicant for purposes of establishing a prima facie case, and Malanche would not have satisfied that element.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ROBERT MALANCHE,

Plaintiff,

v. No. 76-C-258

AMERICAN MOTORS CORPORATION,

Defendant.

DECISION and ORDER

Both the plaintiff and the defendant have filed motions for summary judgment. I find that the defendant's motion should be granted and the plaintiff's motion denied.

In his complaint, Mr. Malanche alleges that he was discriminated against in employment in violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e et seq. He charges that he applied for employment with the defendant corporation. He claims that during the period from 1958 to 1974 he was denied employment even though the defendant hired persons in the same trade who had the same or less qualifications than the plaintiff. The court has before it the pleadings in the case, affidavits of various persons, and numerous discovery depositions. In addition, the court has had the benefit of briefs by both parties.

Mr. Malanche had previously been an employee of the defendant but was discharged on December 10, 1958, for

absenteeism. The defendant contends that his subsequent applications for employment were delayed (1) because of Mr. Malanche's prior employment record with AMC, (2) because from 1970 until early 1973 no journeyman welders were hired by AMC, and finally, because Mr. Malanche failed to supply proof of his journeyman status as a welder until February 25, 1974. After such date and upon his completing the required physical examinations, the plaintiff was offered employment and did, in fact, commence work for the defendant on June 5, 1974.

Thus, it is the defendant's contention that there was no disparate or discriminatory treatment applied in the plaintiff's case. Instead, the defendant urges, the record demonstrates that the plaintiff was not hired because of uniformly applied company policies and because Mr. Malanche was a previously discharged employee who could not be rehired until he offered proof of his journeyman's status. The defendant, with considerable cogency, argues that when the necessary documentation as to Mr. Malanche's journeyman's status was in fact provided in early 1974, the hiring process was then commenced.

While the plaintiff urges that there are certain inconsistencies in connection with the policies claimed to be the "uniform" procedures of the defendant, I find that the record substantially supports its contention that it applied nondiscriminatory standards in Mr. Malanche's case. The present record is so convincing that I am prepared to rule as a matter of law there was no discrimination against the plaintiff on the part of the defendant American Motors Corporation during the period prior to February 25, 1974. It was on that date that Mr. Malanche established his journeyman status and the defendant began the hiring procedure which culminated in Mr. Malanche's return to employment on June 5, 1974.

I find that the defendant has met its burden of showing that there were nondiscriminatory reasons for the initial refusal to rehire Mr. Malanche and also legitimate nondisparate justifications for the delay in rehiring him. On the other hand, the present record establishes that Mr. Malanche has failed to demonstrate that the defendant's conduct concealed either a pattern of unlawful discrimination or unlawful discrimination in his case. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972); cf. Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977).

Therefore, IT IS ORDERED that the plaintiff's motion for summary judgment be and hereby is denied.

IT IS ALSO ORDERED that the defendant's motion for summary judgment be and hereby is granted.

IT IS FURTHER ORDERED that the plaintiff's action be and hereby is dismissed.

Dated at Milwaukee, Wisconsin, this 30 day of December, 1977.

/s/ Myron L. Gordon

U. S. District Judge